IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 18,903

FRED MEYER, INC., a corporation, and FRED G. MEYER and EARLE A. CHILES, individually and as officers of said corporation, *Petitioners,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

On Petition to Review and Set Aside Order of the Federal Trade Commission

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REPLY BRIEF FOR PETITIONERS

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I. Respondent's Contention That "Much" of Petitioners' Argument Is Vitiated By Failure to Specify as Erroneous the Challenged "Findings" of the Commission Is Without Merit

Respondent argues that "much" of petitioners' argument is vitiated by their reliance upon facts contrary to so-called "findings" not specified as error and asserts that petitioners seek a trial *de novo* by this Court (Resp. Br., pp. 31-35). Such contentions are unfounded. Respondent itself points out that petitioners argue the evidence does not support the conclusions and inferences of the Commission, that the Commission erred as a matter of fact and law in finding the alleged violations and that the Commission's decision and order should be set aside (*E.g.,* Resp. Br., pp. 40, 70, 67-73, 77). This, of course, questions the validity of all the ultimate findings of the Commission and, as respondent also notes (Resp. Br., p. 3, n. 3), petitioners challenge each of these conclusions directly as not being "supported by reliable, substantial and probative evidence as required by the Administrative Procedure Act," citing the landmark decision of *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 (1951) (Pet. Br., p. 7). Petitioners also so specify in their petition to review (R. 707-14).

Thus, while admitting that the ultimate conclusory findings of the Commission are in issue, respondent apparently contends that the specification of errors should have contained a specific challenge to each subsidiary "finding." This is tantamount to arguing that a finding by the Commission of a violation of law is not reviewable and is, indeed, an outright attempt to avoid judicial review. The Commission's decision consists of 63 pages of mixed findings, arguments, inferences, policy declarations, etc. Many of the so-called "findings" of fact as to the "evidence" are not findings at all but consist of inferential conclusions and arguments. Indeed, there are no findings of fact actually so denominated. Respondent now, by relying to a substantial degree upon the so-called "findings" as if they were evidence is openly inviting the Court to "rubber stamp" its ultimate holding without the exercise of any review function.

As stated in *Universal Camera, supra,* "it cannot be too often repeated that judges are not automata" in the exercise of their function in reviewing acts of administrative agencies (340 U.S. at 489). The Courts, of course, have a duty under the Administrative Procedure Act to "review the whole record or such portions thereof as may be cited . . ." (5 U.S.C. § 1009(e)). The meaning of this requirement was made clear by the *Universal Camera* holding that a court must set "aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view" (340 U.S. at 488).

The adverse conclusory findings and rulings of the Commission are the very basis of petitioners' appeal here, and each has been directly and properly challenged.

II. The Commission Cannot Claim Jurisdiction Under Section 5 of the Federal Trade Commission Act to Proceed Against a Buyer for the Inducement and Receipt of Promotional Allowances

Respondent argues that "Congress' omission to mention the practice [of inducing discriminatory promotional allowances] when amending Section 2 of the Clayton Act was inadvertent rather than studious. . ." (Resp. Br., p. 37) and, on this basis, claims jurisdiction under Section 5 of the Federal Trade Commission Act. The assertion of "inadvertent" omission is overwhelmingly contradicted by the legislative history of the Robinson-Patman Act which conclusively establishes that Congress deliberately and with conscious intent omitted the inducement of discriminatory promotional allowances from the coverage of that Act. The unrebuttable facts are:[1]

1. The Federal Trade Commission Act and the Clayton Act were passed by the same Congress in 1914. Pub. L. No. 203, 63d Cong., ch. 311, §§ 1-11, 38 Stat. 717-724 (Sept. 26, 1914); Pub. L. No. 212, 63d Cong., ch. 323, §§ 1-26, 38 Stat. 730-740 (Oct. 14, 1914).

2. While the House and Senate were deliberating upon the Federal Trade Commission Act in 1914, the Senate adopted a floor amendment to the Clayton Act striking out the section relating to price discrimination upon the theory that this subject matter was covered by the phrase "unfair. methods of competition" in the Federal Trade Commission Act and that this matter would, therefore, be dealt with under that Act (51 Cong. Rec. 13849, 15828, 16154; Appendix, pp. 1-3, 12).

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[1] For the convenience of the Court, the pertinent legislative materials referred to in this section are reproduced in the Appendix to this brief.

3. The Conference Committee reinstated the price discrimination prohibitions in the Clayton Act (Section 2) and authorized the Federal Trade Commission to issue restraining orders *under that Act* to prevent such discriminations because such discriminations were not covered by the Federal Trade Commission Act (51 Cong. Rec. 15828, 16154, 16317-16318; Appendix, pp. 1-3, 13; S. Doc. No. 585, 63d Cong., 2d Sess. on H.R. 15657, 51 Cong. Rec. 16264), and then enacted the Clayton Act on October 15, 1914, after the Federal Trade Commission Act had been passed on September 26, 1914.

4. In its *Final Report on the Chain-Store Investigation,* S. Doc. No. 4, 74th Cong., 1st Sess. (1934), at 96-97, the Commission, prior to the Robinson-Patman Act amendments to the Clayton Act in 1936, recommended amendment of Section 2 of the Clayton Act to include a broad general prohibition against price discriminations (Appendix, p. 3). This amendment was, of course, unnecessary if the Commission had jurisdiction under Section 5 of the Federal Trade Commission Act to prohibit such discriminations.

5. In the same report, the Commission explained that its recommendation for a broad, generalized amendment outlawing discriminations would be a ''simple solution for the uncertainties and difficulties of enforcement [and] would be to prohibit unfair and unjust discrimination in price and leave it to the enforcement agency, subject to review by the courts, to apply that principle to particular cases and situations. . .'' (*Final Report on the Chain-Store Investigation, supra* at 96). Congress refused to grant this broad authority and enacted instead very precise legislation in the Robinson-Patman amendment.

6. In the First Session of the 74th Congress in 1935, Representative Mapes introduced the exact bill recommended by the Commission in an attempt to obtain Congressional approval of ''unfair or unjust'' discrimination as the legal standard. The Mapes bill was rejected because Congress did not wish to leave it up to the administrative

agency to determine the standards for enforcement (*Final Report on the Chain-Store Investigation, supra,* at 96-97; H.R. 4995, 74th Cong., 1st Sess. (Jan. 29, 1935); 80 Cong. Rec. 8103-8104; *Hearings Before the House Committee on the Judiciary,* 74th Cong., 1st Sess., ser. 10, pt. 1, at 254-255 (1935) (from "Brief Submitted by H. B. Teegarden"); Appendix, pp. 3-7). Since Congress specifically rejected the standard of "unfair" in the Mapes bill in 1935, the Commission cannot resort to the same "unfair" standard enacted in 1914 in Section 5 and apply it to discriminatory practices.

7. In its *Chain-Store* report, the Commission further pointed out that new legislation outlawing discriminations in price was necessary because: "The point cannot be overlooked that if price discrimination was included under the general prohibition of unfair methods of competition when the Federal Trade Commission Act was passed, the latter expression of legislative will in the Clayton Act dealt specifically and in detail with the subject and would therefore seem to take precedence over the more general statutory prohibition" (*Final Report on the Chain-Store Investigation, supra,* at 65; Appendix, p. 7). This is hornbook law. 2 Sutherland, *Statutory Construction* § 5204 (3d ed. 1943). *A fortiorari,* the same principle applies to the Robinson-Patman Act amendment enacted in 1936, 22 years after passage of the Federal Trade Commission Act.

8. Permeating the legislative history of the Robinson-Patman Act is the often repeated declaration that Congress was dealing with concessions exacted by large *buyers* from sellers. 80 Cong. Rec. 6335, 5726-5727, 6257; *Final Report on the Chain-Store Investigation, supra,* at 49 (1934); *Hearings Before the House Committee on the Judiciary,* 74th Cong., 1st Sess., ser. 10, pt. 1, at 31-32 (1935) (from "H.R. 8422, A Bill to Amend Section 2 of the Clayton Act," Specific Questions Answered by H. B. Teegarden); Appendix, pp. 7-9.

9. The Robinson-Patman Act was conceived, as demonstrated by Congressional deliberations, to cure abuses of

buying power by means of sanctions against *sellers* rather than buyers as this approach was considered to be more effective. 80 Cong. Rec. 8227; *Hearings Before the House Committee on the Judiciary, supra,* at 31-32; *Final Report on the Chain-Store Investigation, supra,* at 49 (1934); Appendix, pp. 8-9; Rowe, *Price Discrimination Under the Robinson-Patman Act,* 12 et seq. (1962).

10. Omission of buyer liability in the Robinson-Patman Act could not have been inadvertent since Congress, in specific reference to Section 2(d) providing for action only against sellers, clearly recognized that the prohibited practice resulted from buyer initiation and inducement. H.R. 2287, 74th Cong., 2d Sess., at 15-16 (1936); 80 Cong. Rec. 6257; Appendix, p. 10. Indeed, the Act was known as anti-chain store legislation. Rowe, *op. cit. supra,* at 3-5, 8-11.

11. In the light of constant Congressional awareness when considering the legislation that discriminatory promotional allowances were invariably a result of buyer inducement, it cannot be said that the omission from the Act of buyer liability was inadvertent.

12. If there was any "inadvertence" by Congress (which there clearly was not) logic would dictate that, should any strained statutory construction be indulged in, it must be to construe Section 2(f) of the Robinson-Patman Act to include promotional allowance inducements since it was the universal conception of both Houses of Congress that promotional allowances were merely a variation or species of price discrimination. 80 Cong. Rec. 8110, 8127, 8128, 8236 and 9419; *Hearings Before the House Committee on the Judiciary,* 74th Cong., 1st Sess., ser. 10, pt. 1, at 31 and 218 (1935); *Final Report on the Chain-Store Investigation, supra,* at 59-60; Appendix, pp. 10-12; Rowe, *op. cit. supra,* at 432-436.

13. In *Automatic Canteen Co.* v. *FTC,* 346 U.S. 61 (1953), the Supreme Court pointed out that "the Commission has, by virtue of the Robinson-Patman Act, been given some authority to develop policies *in conflict with those of the*

Sherman Act in order to meet *the special problems created by price discrimination*" and that, therefore, "although due consideration is to be accorded to administrative construction where alternate interpretation is fairly open, it is our duty to reconcile such interpretation, *except where Congress has told us not to,* with the broader antitrust policies that have been laid down by Congress" (*Id.* at 74; emphasis added). Expansion of jurisdiction to cover buyer inducement of promotional allowances under Section 5 on the ground Congress "inadvertently" omitted it in the Robinson-Patman Act is contrary to the *Automatic Canteen* injunction for strict construction of the Robinson-Patman Act to minimize conflict with the Sherman Act.[2]

III. The Payments Received in Connection With the Coupon Promotions Are Not Cognizable Under Section 2(a)

In attempting to answer petitioners' first threshold argument, *i.e.,* that the payments here involved are cognizable, if at all, only under Section 2(d) (Pet. Br., pp. 16-26), respondent states that Sections 2(a) and 2(d) "are not mutually exclusive" and that even if the payments received by petitioners "were for services rendered by petitioners" this would not preclude them from also constituting price discriminations, since payments for services and facilities "may or may not amount to indirect price discriminations within the meaning of Section 2(a)", quoting from Austin, *Price Discrimination and Related Problems Under The Robinson-Patman Act* (Resp. Br., p. 78). The quoted statement appears in Austin's pamphlet without supporting authorities and refers to "indirect price discriminations." It is obvious that if a payment for services or facilities is merely a subterfuge for a price discrimination, as a matter of fact, it can amount to indirect price discrimination. But that, of course, is not the fact in the instant case. The only other authorities referred to by respondent are two "*Cf.*" references which are completely meaningless, *viz., Elizabeth Arden Sales Corp.* v. *Gus Blass Co.,* 150 F. 2d 988 (8th Cir.

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2 See also, Report of the Attorney General's Committee to Study the Antitrust Laws (1955), pp. 148-149, n. 78.

1945), and *Sun Cosmetics Shoppe* v. *Elizabeth Arden Sales Corp.,* 82 F. Supp. 687 (S.D.N.Y. 1949). Both of these cases deal with the interrelationship between Sections 2(d) and 2(e) and bear no relationship whatsoever to price discriminations under Section 2(a). In the absence of decisional authority, respondent urges that "overlapping coverage [*i.e.,* making the same transaction actionable indiscriminately under Sections 2(a) or 2(d)] is consistent with the Congressional purpose" (Resp. Br., p. 78) to outlaw discriminatory rebates. The point is, however, that Congress delineated specific and differing statutory criteria for different types of discriminations. Thus, Section 2(a) prohibits price discriminations only where it is shown that the effect may be to substantially lessen competition, whereas, under Section 2(d), injury to competition is presumed. Moreover, a showing of discrimination and probable competitive injury constitutes proof only of a *prima facie* Section 2(a) case which may be rebutted and against which certain affirmative defenses may be advanced, such as cost justification and changing market conditions. On the other hand, Section 2(d) is a *per se* section under which such exculpatory defenses are not available. Congress having delineated the required substantive proofs and procedures as to burden of proof with respect to the separate sections, it is completely illogical to assume that it made the same transaction subject to a *per se* rule, as in Section 2(d), and at the same time subject to a non-*per se* rule, with multiple affirmative defenses available, as in Section 2(a). Significantly, petitioners here do not claim that the transactions fall under that section which enlarges the burden of proof of respondent or bestows upon petitioners exculpatory defenses—it is petitioners' contention that the transaction falls under Section 2(d), the *per se* section.

Petitioners, in their main brief, suggested that the Commission's categorization of the payments received by Fred Meyer as being subject to both 2(a) and 2(d) was arbitrary, pointing out that companion cases against petitioners' suppliers were inconsistent. In its reply brief, respondent takes issue only with our treatment of one of these cases, *Tri-Valley,* asserting that two complaints, one under Section 2(a) and one under Section 2(d), were issued and consolidated for hearing; that, while the complaint in the 2(d) case admittedly alleged both the $350 payment for printing and distributing the coupon book and the additional payment for redemption of the promotional coupons as violative of Section 2(d), the hearing examiner found only that the $350 payment violated 2(d); and that, consequently, there was no issue before this Court on review of the Commission's *Tri-Valley* decision as to whether the *total* payment by *Tri-Valley,* to petitioners was cognizable under Section 2(d) (Resp. Br., p. 79-80). This is completely erroneous. While it is true that the examiner's finding in the *Tri-Valley,* case concerned only the $350 payment in connection with the alleged 2(d) violation (60 F.T.C. 1134, 1146-47), the full Commission "vacated and set aside" the examiner's initial decision for failure "to make adequate findings of fact" and entered its own "findings, conclusions and order. . ." (60 F.T.C. at 1175).

In its own findings of fact, the Commission found that Tri-Valley granted promotional allowances to Fred Meyer and that "the arrangement to grant the allowance was a specially tailored or negotiated deal involving promotional activities initiated by the purchaser" (60 F.T.C. at 1182). The Commisison made no reference to the limited $350 payment, as had the hearing examiner, and specifically found that Tri-Valley "granted allowances for merchandising services furnished by such retailers [including Fred Meyer] in the resale of these private label goods" (*Id.* at 1174).

On review of the case, respondent Commission set forth in its brief to this Court (pp. 20-21) the facts relevant to the Tri-Valley transaction and expressly noted that Tri-Valley's payment included both the $350 amount and the amount granted for redemption of coupons. The Commission then stated Tri-Valley's argument that the transaction was not cognizable under 2(d) as follows:

Petitioner contends (brief p. 158) that the evidence:

> * * * shows clearly that Petitioner agreed to make these payments [*viz.,* the special promotional pay-

> ments to two of its customers] to induce and facilitate the *original* sales, and that the purchasers did not agree to contract to render any services or to furnish any facilities in connection with the *subsequent resale* of the goods.[3]

In answering petitioner Tri-Valley's contention, the Commission stated at page 60 of its brief to this Court:

> In 1957, petitioner participated in the Meyer "coupon book" program. Specifically, petitioner paid Meyer the flat sum of $350.00 to cover the cost of an advertisement in the Meyer "coupon book"; *as part of this same advertising promotion, petitioner also contracted to redeem the coupons returned to it by Meyer* (emphasis added).

With the issue thus posed four-square, this Court, in its *Tri-Valley* decision, restated the facts, noting specifically that the coupon redemption amount was an integral part of the agreement (329 F. 2d at 707) and then agreed with the Commission and held squarely that the *total* transaction was cognizable under Section 2(d). In view of this, it is clearly incorrect factually, and respondent is estopped from now arguing as it does, that in the *Tri-Valley* case only the $350 payment was in issue (Resp. Br., p. 80). The only unanswered question, therefore, is whether the identical transaction can *also* be cognizable under Section 2(a). As we have pointed out, respondent has advanced no authority, case law or otherwise, in support of its novel proposition. On the other hand, petitioners' authorities (Pet. Br., pp. 16-26) demonstrate conclusively that the payments made in connection with Fred Meyer's coupon promotion are cognizable, if at all, only under Section 2(d).

Petitioners also argued that the Commission erred as a matter of *fact* in its holding that the total payment was not in consideration of services and facilities rendered (Pet. Br., p. 7). Respondent declines to even come to grips (Resp. Br., p. 80, n. 32) with petitioners' conclusive factual showing in this respect (Pet. Br., pp. 20-23).

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[3] Petitioner Tri-Valley argued at page 158 of its brief: "When the facts are as hereinabove summarized, the payments or allowances do not fall within the prohibitions of subsection (d)."

IV. Wholesale Customers Are Not Entitled to Promotional Benefits Equivalent to Those Granted Retail Customers Under Section 2(d)

In their second threshold argument, petitioners urge that Section 2(d) does not require a seller who offers or grants promotional allowances to retail customers to offer proportional allowances to its wholesale customers. Respondent admits that its holding in this case is diametrically contrary to prior Commission precedent; that its position "is at odds with this Court's ruling in *Tri-Valley Packing Association* v. *Federal Trade Commission"*; and that this Court's ruling in *Tri-Valley* "of course, is now the law of the *Tri-Valley* case" (Resp. Br., p. 58). Nonetheless, respondent asks the Court to apply a different rule of law here than that applied in *Tri-Valley.* The net result is paradoxical: As to Tri-Valley the transaction at issue is completely legal but as to Fred Meyer the same transaction is illegal. A mere statement of the proposition requires its rejection.

Lacking any authority for its holding, except one District Court case, which petitioners contend is not in point (Pet. Br., pp. 34-35), respondent resorts to the bald assertions that its former construction of the statute, which it has administered for over 25 years (since 1936), is in "conflict with economic reality" (Resp. Br., p. 61), is "contrary to the plain language" of the statute, produces an "inequitable result" and is contrary to legislative intendment (Resp. Br., p. 59). Under such circumstances, we submit, these assertions cannot be taken seriously.[4]

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[4] Answering a similar contention of the Commission, the Supreme Court stated in *FTC* v. *Bunte Brothers,* 312 U.S. 349 (1941):

> That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not dependent on control over intrastate transactions. Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so *the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred* (*Id.* at 351-52; footnote omitted; emphasis added).

Moreover, if we are to depart from the clear language of the statute and 25 years of consistent construction, "eco-onmic reality" and "equity" support petitioners. While a retailer, such as Fred Meyer, can contract to furnish, and can actually furnish, value to the seller in return for a promotional allowance, a wholesaler cannot normally do so. He sells to wholly independent retailers. Thus, if the seller grants the wholesaler a per case promotional allowance, the wholesaler may pocket the allowance, pass it on to his favored customers, or give it to all of his retail customers. But the wholesaler is not set up to assure the seller it has received its proper *quid pro quo* in promotional and advertising efforts.[5] Obviously, it would be unfair to require the seller to pay such allowances where the recipient, by virtue of the very nature of its operation, cannot assure receipt of value in return. To avoid this result and attempt to obtain his *quid pro quo,* the seller would have to police the pricing and promotional allowance policies of his wholesale customers. Even if permitted, this would involve so much detailed investigation by the seller that it would not be worth the candle and would raise a serious question as to the seller's liability under the Sherman Act for interference with his wholesale customers' pricing and promotional policies.

Respondent, attempting to avoid petitioners' well-founded contention that the theory of the complaint in this case is so at variance with the rationale of the decision that no order can be properly entered, characterizes it as frivolous, merely states that petitioners had the opportunity to develop all the relevant facts, and asserts that

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[5] The Wadhams witness, for example, testified that his company "would not have been interested in an advertising allowance as such, for our Wadham's brand" since it would demand "that we perform a function of advertising, which requires an expenditure of money" and "none of our stores would have been interested in advertising the Wadham's grade of corn" (R. 272-73). Not only does this emphasize petitioners' position, but it precludes a finding of a Section 2(d) violation by Idaho Canning with respect to Wadhams since a supplier is not required to engage in a futile gesture, *i.e.,* offer promotional benefits when such offer would be rejected. *Vanity Fair Paper Mills, Inc.* v. *FTC,* 311 F. 2d 480, 485 (2d Cir. 1962); *Liggett & Myers Tobacco Co., Inc.,* 56 F.T.C. 221, 253 (1959).

the only issue is the proper application of the law to such facts (Resp. Br., p. 66, n. 26).[6] But the development of so-called "relevant facts" presupposes a knowledge of the status of the law at the time of trial to which such facts are relevant. Here the law was clear at the time of trial—wholesalers were not legally entitled to allowances proportional to those accorded retailers. Thus, there was no occasion to adduce evidence as to whether sellers generally accord to wholesalers different terms and conditions of purchase, or offer to them different types of promotional aids in view of their radically different structural make-up as compared to retailers; whether sellers service wholesalers in a different manner to the benefit of the wholesaler; whether wholesalers even want promotional allowances for which they must prove the actual rendering of services and facilities; and a host of other factual considerations bearing on so-called "economic reality" and fairness.

All petitioners were required to prove under existing law at the time of the trial was that the alleged disfavored customers of its suppliers were wholesalers and the matter was at an end. *Atalanta Trading Corp.*, 53 F.T.C. 565 (1956), *set aside on other grounds*, 258 F. 2d 365 (2d Cir. 1958); *Liggett & Myers Tobacco Co., Inc.*, 56 F.T.C. 221 (1959).

In the instant case, the Commission directly overruled its *Liggett & Myers'* holding (R. 93). Petitioners do not question the Commission's right to do so; but to retroactively apply the reversal of long-standing precedent and base findings of illegality on transactions admittedly legal at the time they were entered into is quite another matter and, in equity and fairness, abhorrent to the law. The Supreme Court recently, in *Simpson* v. *Union Oil Co.*, 377 U.S. 13

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[6] In its "Opinion On Respondents' Exception To The Proposed Order," the Commisison states that "each and every one of the *facts*" on which it based its conclusion was "put in issue by the pleadings" and was "vigorously litigated" (R. 148). In support of this holding, the Commission, however, specifically acknowledges that the "question of fact was thoroughly litigated under the *pricing count* of the complaint" (R. 152; emphasis added) and its entire discussion answering petitioners' argument relates to the evidence and facts under the Section 2(a) count (see R. 152-55).

(1964), reexamined an earlier decision, *United States* v. *General Electric Co.,* 272 U.S. 476 (1926), in which it had been held lawful for sellers to use agents and set their resale prices and, in effect, overruled it. However, in recognition of the fact that Union Oil's contracts were legal under *General Electric* when put into effect, the Court stated: ''We reserve the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device which we announce today'' (377 U.S. at 24-25). Subsequently, the District Court in *Lyons* v. *Westinghouse Electric Corp.,* 1964 Trade Cas. ¶71,266 (S.D. N.Y. 1964), refused to apply retroactively the law enunciated in *Simpson* because it would be ''manifestly unjust'' to do so, stating: ''the Supreme Court may eventually decide that it will not apply the new doctrine to the Union Oil Company in that particular case, but will limit itself to announcing that the new rule will henceforth govern future cases'' (*Id.* at p. 80, 153).

The unfairness of retroactive application by agencies such as respondent Commission is accentuated by the liberality in their rules of evidence, by the combination of prosecution and adjudicative functions, and by the utilization of tenuous inferences upon which to base convictions. In *NLRB* v. *International Brotherhood of Teamsters,* 225 F. 2d 343 (8th Cir. 1955), the Board, in finding the Union guilty of an unfair labor practice, had expressly overruled one of its earlier decisions. The Court held that the Board may put potential parties on notice by a general statement of policy in advance and, in so doing, notify those subject to its jurisdiction of the abandonment of contrary prior precedent in future actions or overrule or abandon prior views and holdings. But, said the Court, ''we do not believe that the spirit of the Act, either administrative or general, entitles the Board, on engaging in such an about-face from its previous position and ruling, no matter in what manner or circumstances this is done, to brand a party as being guilty of an unfair labor practice'' so long as the

"Board's express [prior] holding . . . has remained unrenounced" (*Id.* at 348). These simple principles of fairness have been applied in many administrative proceedings.[7]

V. The Alleged Section 2(f) Violation

A. The Commission Erred In Finding That Requisite Adverse Competitive Effects Were Shown

Respondent attempts to brush aside petitioners' argument that the Commission erred in finding that requisite adverse competitive effects resulted from the price discriminations received by Fred Meyer by erroneously asserting that *American Oil Co.* v. *FTC,* 325 F. 2d 101 (7th Cir. 1963), *cert. denied,* 377 U.S. 954 (1964), is inapposite.

To the contrary, the legal principles governing the application of Section 2(a) to *temporary* differences in price, such as those here concerned, were specifically enunciated in *American Oil.* There, as here, the Commission had applied rigidly the *Morton Salt*[8] holding, which related to permanent price reductions installed pursuant to a corporate policy designed to favor large buyers, and found a violation on the theory that illegal price discriminations can be inferred from any substantial price difference, no matter how short its duration and notwithstanding the absence of discernible competitive effects. But this theory the Court expressly rejected, holding there is a vast difference between temporary and permanent price differences:

> The record here does not present that inherent capability of lessening competitive ability as was evidenced by the discriminatory pricing system in F.T.C. v.

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[7] See *Lesavoy Foundation* v. *Commissioner of Internal Revenue,* 238 F. 2d 589 (3d Cir. 1956), *Wood Wire and Metal Lathers International Union,* 119 N.L.R.B. 166 (1958), 7 Ad. L. (2d Series) 781, *Franco Western Oil Co.,* 65 I.D. 427 (1958), 8 Ad. L. (2d Series) 749.

Indeed, the Federal Trade Commission in earlier days recognized the equities under such circumstances when, in *Arnold Constable Corp.,* 55 F.T.C. 577 (1958), it dismissed a complaint even though a violation of law had been proved since the respondent there had relied upon informal advice of certain Federal Trade Commission personnel. Certainly, a well considered precedent of many years standing decided by the full Commission in its quasi-judicial capacity is of even greater stature.

[8] *FTC* v. *Morton Salt Company,* 334 U.S. 37 (1948).

> Morton Salt Co. . . ., which gave buyers of large quantities a built-in, routine and permanent price advantage over smaller rivals (325 F. 2d at 106).[9]

The ultimate factual question, the Court ruled, is whether "the price discrimination creates a reasonable probability of substantial injury to competition—such an injury as will with reasonable probability substantially lessen the ability of the unfavored dealers to continue to compete (325 F. 2d at 104). Discrimination, held the Court, "*no matter if substantial,* must in the particular factual situation involved be capable" of creating such adverse, competitive effects (*Ibid*; emphasis added). And this test is not satisfied by proof of a "minor and temporary loss of business," "an essentially temporary minimal impact on competition," or even by an "actual economic loss" which is only "slight" (325 F. 2d at 104, 105, 106).

Despite all this, respondent argues that the Court in *American Oil* "explicitly distinguished" the situation there and that here (Resp. Br., p. 82). However, the distinctions made by the Court (325 F. 2d at 106) were between precisely the situation here, *i.e.,* where temporary price differences are involved, and that in which the price differences are "routine and permanent," as in *Morton Salt, supra,* are "systematic" as in *Corn Products Refining Co.* v. *FTC,* 324 U.S. 726 (1945), or are "continuing" and "systematic" as in *E. Edelmann & Co.* v. *FTC,* 239 F. 2d 152 (7th Cir. 1956), *cert. denied,* 355 U.S. 941 (1958).

Moreover, the Commission itself found that the concessions received by petitioners during the four-week promotion were not such as to create a reasonable possibility of substantial injury to competition when it dismissed the charge that Cannon Mills violated Section 2(a) in granting the very allowances here in issue on the express ground that there was no basis for a finding of competitive injury (Pet. Br., p. 79).

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[9] American Oil's price differences continued for approximately three weeks (325 F. 2d at 103); Fred Meyer's continued for four weeks (R. 62). American Oil's "favored" customers received price reductions ranging from 20% to nearly 50% (60 F.T.C. at 1792, n. 2). Here the reductions were even less.

B. The Commission Erred In Finding That Petitioners Knew Or Had Reason To Know That The Prices Received Were Unlawful

As to one of the elements which respondent had the burden of proving, *i.e.,* that petitioners knew or had reason to know that the allowances received were not cost justified, respondent admits, as it must, that the Commission's so-called "finding" to this effect is an inferred finding based upon other inferred findings (Resp. Br., p. 86). Respondent's first argument that the Commission's "inferred finding" that Fred Meyer pays, "during eleven months out of the year, the same price that every other buyer pays," and "after the one-month period of the coupon book promotion ends, they go back to paying that higher price" (Resp. Br., p. 86) is irrelevant, even if, as respondent erroneously contends, there were direct evidence of such. It is the large volume purchases during the coupon promotion, the one-month period, which justify the lower prices received and these quantities were purchased only during that period. Respondent disregards this fact and, indeed, admits that the Commission merely "*drew an inference* that petitioners' purchasing in *larger quantites* than their competitors does not generate 'any measurable cost savings for those sellers' " (Resp. Br., p. 86; emphasis added).

As respondent acknowledges, the Supreme Court held in *Automatic Canteen* that "a buyer who knows that he buys in the same quantities as his competitor and is served by the seller in the same manner or with the same amount of exertion as the other buyer can fairly be charged with notice that a substantial price differential cannot be justified" but that when methods or quantities differ the Commission must show the differences "could not give rise to sufficient savings in cost . . . to justify the price differential" (346 U.S. at 80). The evidence here conclusively shows that the quantities purchased by petitioners and by the allegedly disfavored competitors were substantially different (Pet. Br., pp. 70-72). It was, therefore, as the Supreme Court held in *Automatic Canteen,* the Commission's burden to "show" (not to infer) that the differences in quantities or methods did not give rise to sufficient savings in cost to justify the price differences, or to "show" (not to infer) that the actual cost savings were "very small compared with the price differential." Having failed to meet this burden, respondent now argues that the admittedly and substantially greater quantities purchased by Fred Meyer have no bearing upon the inferences which can be drawn (Resp. Br., pp. 87-88).[10] Indeed, it argues that *Automatic Canteen* "plainly did not . . . hold" that an inference of guility knowledge is improper under such circumstances (Resp. Br., pp. 87-88). Once the discrepancy in size of purchases was shown, however, as this Court held in its *Alhambra* decision,[11] the *Automatic Canteen* holding clearly requires the Commission to show that cost savings did not justify the price differential. The inferences of the Commission do not satisfy that burden.

Respondent, believing that "in equity petitioners should have the benefit" of the Commission's determination in the *Cannon Mills* case, has abandoned its contention and finding that Cannon Mills violated Section 2(a) here (Resp. Br., pp. 74-75). While the Commission in this case has held that petitioners had "every reason to believe that there is not the *remotest* possibility of 'cost justification' " and "accordingly, [saw] no necessity for a prolonged inquiry as to whether or not [petitioners] volume of purchases . . . *did in fact* effect cost savings" (R. 135-36; emphasis added), such an inquiry in the *Cannon Mills* case proved conclusively that the price difference was more than cost justified (see Pet. Br., pp. 76-77). The Commission's improper *inference* that prices received by Fred Meyer were not cost justified epitomizes the impropriety of its specula-

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10 Despite the specific evidence showing purchases of substantially different quantities, respondent makes the specious assertion, referring to testimony of the Idaho Canning witness, that "petitioners and Hudson House purchased substantially the same quantities of its products (R. 497)" (Resp. Br., p. 88). This witness, however, was testifying, without benefit of documents, as to the *general* volume of purchases, acknowledged that petitioners' purchases of "fancy canned corn" were larger than Hudson Houses', and, more importantly, was not referring at all to Fred Meyer's purchase in connection with its promotion (see R. 497).

11 *Alhambra Motor Parts* v. *FTC*, 309 F. 2d 213, 219 (9th Cir. 1962).

tive, argumentative "findings," requires that they be set aside, and testifies eloquently to the validity of the Supreme Court's holding that lack of cost justification can be found only after specific inquiry into all relevant facts.

Respondent next argues, as it does with regard to the alleged Section 5 violation, that the mere initiation by a buyer of a price concession is sufficient to place upon it a duty of affirmative inquiry as to legality and, in effect, that such initiation permits automatically a finding of "guilty knowledge" (Resp. Br., pp. 88-89). This, of course, is diametrically opposed to the Supreme Court's *Automatic Canteen* holding (see pp. 26-29, *infra*).[12]

Additionally, respondent argues that "petitioners' *contract* with [the participating] suppliers provided that the arrangement under which those suppliers' products were

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[12] Respondent also argues that petitioners exercised "coercive pressures" upon Idaho Canning to obtain that supplier's participation in the 1957 promotion (Resp. Br., pp. 82-83, n. 34), stating:

> . . . petitioners approached that supplier about the matter early in 1957, . . . Idaho did not agree to grant the discriminations and did or said nothing to lead petitioners to believe that it had agreed, but petitioners nevertheless featured an Idaho Canning product in their 1957 sale and thereafter billed it $350 for the coupon-book page and $2,953.41 for the ⅓ cut in price. It [the Commission] found that Idaho denied the debt and returned the bill to petitioners, and thereafter petitioners deducted the total from a payment to Idaho, that Idaho protested and petitioners returned the money to Idaho, but a few months later Idaho yielded and shipped to petitioners $2,935.41 worth of free goods (Resp. Br., p. 83).

The fatal flaw in this contention is the implication that petitioners, absent an agreement and without authority, featured an Idaho Canning product in the promotion and then "coerced" payment therefor. The evidence, however, is that petitioners actually believed, in good faith, that Idaho Canning had agreed to participate and was so advised by Idaho Canning's broker (R. 207-09). Indeed, a specific arrangement was negotiated, believed agreed upon, and submitted in writing to Fred Meyer's coupon book committee (R. 208-09; CX 38). On the basis of this belief, Fred Meyer included Idaho Canning in the promotion. After the promotion was completed it apparently developed that Idaho Canning's broker had exceeded his authority in committing Idaho's participation. Since Fred Meyer is charged with having induced Idaho Canning's *participation* with knowledge that the allowances received would be unlawful, respondent's argument that the circumstances referred to rendered the claimed lack of knowledge culpable is without merit.

sold at greatly reduced prices to petitioners for resale during the coupon-book sale, would be exclusive during the 4-week period,'' that ''the *contract* prevented the sellers from entering into similar arrangements with petitioners' competitors,'' and that the cost justification proviso is, therefore, inapplicable (Resp. Br., pp. 89-90). This contention is falacious. First, the suppliers did *not* contract to grant the allowances exclusively to Fred Meyer (see *infra*, pp. 29-30). Second, since none of the allegedly discriminated against customers purchased in quantities which even approached those purchased by Fred Meyer (Pet. Br., pp. 70-72), the lower prices could not legally have been offered.

The remainder of respondent's argument consists of an assertion that a buyer cannot request a supplier to grant reduced prices in order to conduct a promotional program since the substantially larger quantities purchased would eventuate only by reason of the promotion. The simple answer is that cost justification is an absolute defense and it is of no consequence why a buyer is able to purchase in larger, cost justified quantities. *Automatic Canteen Co.* v. *FTC, supra.* For the same reason respondent's argument that when petitioners requested the reduced prices they did not ''claim them as something to which they were entitled by reason of cost savings resulting from larger purchases'' is of no merit (Resp. Br., p. 90). Indeed, as the Supreme Court has observed, a showing of cost justification must invariably be made by means of studies conducted after-the-fact. *Automatic Canteen Co.* v. *FTC, supra,* at 68-69.[13]

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[13] Respondent's *Cf.* reference to and quotation from *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F. 2d 988, 994 (8th Cir. 1945), *cert. denied,* 326 U.S. 773 (1945), in support of its argument that a price difference cannot be justified by after-the-fact proof that such differences reflected cost savings (Resp. Br., p. 90) is distorted from its context since that case dealt with the question of ''availability'' of Clayton Act Section 2(d) and 2(e) promotional benefits under a claimed but non-existent proportional program.

VI. The Alleged Section 5 Violation

A. The Commission Erred In Finding That Fred Meyer's Suppliers Violated Section 2(d)

As to Tri-Valley and Idaho Canning, petitioners contend that the Commission erred as a matter of law in ruling that the allegedly disfavored customers (Hudson House and Wadhams & Co.) were entitled to equal promotional benefits since they are wholesale customers and do not functionally compete with Fred Meyer, and since there has been no showing that their retailer-customers were "indirect" customers of the suppliers, as this Court held is required in *Tri-Valley Packing Association* v. *FTC,* 329 F. 2d 694 (9th Cir. 1964). Respondent's argument taking issue with the correctness of this ruling is answered at pages 11-15, *supra.*

Additionally, petitioners contend that the Commission's conclusion that Tri-Valley and Idaho Canning violated Section 2(d) is erroneous since, not only have "indirect" customer relationships not been established, but there is no evidence even showing who these "indirect" customers might be, *i.e.,* which retailer-customers of Hudson House or Wadhams competed with Fred Meyer and actually handled, stocked or resold said suppliers' products. Respondent does not argue that such proof exists. Instead, it asserts that such proof is unnecessary and that the indispensable fact can be inferred from a mere showing that Tri-Valley and Idaho Canning sold products to the wholesalers in question and that these wholesalers in turn resold such products, although commingled with identically labeled products of other suppliers and of their own cannery, to their retailer-customers. This, it argues, is sufficient because "the possibility that all [such] products by chance found their way to other areas was too remote for consideration" (Resp. Br., p. 44). The remoteness of the possibility, however, even if of consequence, is not nearly as substantial as respondent asserts.

Hudson House serves approximately 287 "larger customer retail stores", only 127 (45%) of which are actually located in the Portland area (Resp. Br., p. 44). Hudson

House also serves a substantial number of "smaller" retail stores, a large percentage of which are also located outside the Portland area (CX 67A-67Z5; R. 246-47). Likewise, Wadhams serves approximately 80 retail stores, only about half of which are located in the Portland area, plus about 300 additional retail stores through its "cash-and-carry units", of which only three are in Portland (CX 68; R. 265-66). Clearly, therefore, the possibility that Tri-Valley and Idaho Canning products were not distributed to *particular* retail stores in competition with Fred Meyer during the *particular* time period here relevant is not remote, and the Commission's inference that it was "too remote for consideration" is improper.[14] This the Commission itself held in *J. Weingarten, Inc.*, Docket 7714, Opinion of the Commission (March 25, 1963).[15]

Respondent next takes issue with petitioners contention regarding Burlington (Resp. Br., pp. 49-52), first arguing that it is not the date on which promotional benefits were contracted, or the dates on which purchases of commodities in connection with which the promotional benefits were granted were made which establishes the relevant time period, but the "time of the promotion" (Resp. Br., p. 45-46, n. 17; 49). Respondent's position is incorrect. In *Atalanta Trading Corp.* v. *FTC*, 258 F. 2d 365 (2d Cir. 1958), the Court specifically ruled that the time lapse between the *sale* to Atalanta in connection with which the promotional allowances were made and the *sale* to the allegedly disfavored customer precluded a finding of violation.

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14 The cases cited by respondent (Resp. Br., p. 47) in support of its wholly novel argument that, when a buyer purchases identically labeled commodities from two or more manufacturers and commingles and redistributes them to its customers, the commodities may be deemed to have been purchased from a single manufacturer, are totally inapposite.

15 "The wholesaler testimony adduced in this record is defective in another respect in that it fails to identify the particular stores serviced which are in competition with Weingarten or, in the instance where stores are shown to compete, there is no showing that these stores handled and sold items similar in grade and quality to those purchased by Weingarten from suppliers who granted it an allegedly discriminatory promotional allowance." *J. Weingarten, Inc., supra,* at p. 8.

However, assuming *arguendo* that the time of the actual promotion is the relevant time period, it is still obvious that Burlington made no sales to Lipman-Wolfe, the allegedly disfavored customer, during such time period. Respondent concedes that, of the hosiery purchased by Lipman-Wolfe from Burlington during 1957, only two style numbers corresponded with those purchased by Fred Meyer (Resp. Br., pp. 49-50). None of these purchases, however, occurred during the period of the coupon book promotion, *i.e.,* the four-week period ending October 23, 1957 (CX 4, 181-86). Similarly, petitioners' promotion in 1958 occurred during the four weeks preceding October 22, 1958 (CX 24). With the exception of a four-dozen purchase of one corresponding style number (style 519), and a seven-dozen purchase of the only other corresponding style number (style 603), Lipman-Wolfe made no purchases of corresponding styles during the period of the 1958 promotion (CX 191-97). Thus, even under respondent's criteria, Lipman-Wolfe made no contemporaneous purchases of relevant goods in 1957 and, in 1958, made such infinitesimal purchases that they cannot be deemed sufficient to support the Commission's finding of violation. *Minneapolis-Honeywell Regulator Co.* v. *FTC,* 191 F. 2d 786, 790 (7th Cir. 1951), *cert. dismissed,* 344 U.S. 206 (1952), *Whitaker Cable Corp.* v. *FTC,* 239 F. 2d 253, 256 (7th Cir. 1956), *cert. denied,* 353 U.S. 938 (1957); *E. Edelmann & Co.* v. *FTC,* 239 F. 2d 152, 155 (7th Cir. 1956), *cert. denied,* 355 U.S. 941 (1958).

Respondent next argues that Burlington's invoice use of corresponding style numbers on two styles of hosiery purchased by Lipman-Wolfe and Fred Meyer establishes that the hosiery was of like grade and quality. However, the private label hosiery purchased for the coupon promotion was manufactured under special specifications prepared by Fred Meyer at the request of Burlington (Pet. Br., p. 48). It being respondent's burden to establish like grade and quality, even should it be correct that invoices establish *prima facie* proof of such, the evidence that Fred Meyer's purchases were under its own specifications destroys any *prima facie* value (see Pet. Br., pp. 47-48).[16] "Antitrust cases," the Commission itself declared in *J. Weingarten, Inc., supra,* at p. 9, and "in particular, Robinson-Patman cases require a meticulous attention to minute details. When dealing with prices, allowances and goods of like grade and quality, the Commission may not indulge in assumptions or presumptions, for these matters are susceptible of exact proof and this is the type of showing which must be made."

Regarding contemporaneous purchases by Roberts Brothers from Cannon Mills, respondent argues that the relevant time period is the period of petitioners' promotion, *concedes that Roberts Brothers made no purchases during this period* (Resp. Br., pp. 52-53), but contends that, although the purchases of towels by Roberts Brothers were one to five months removed from the promotional period, it was proper to infer that Roberts Brothers competed with Fred Meyer in the resale of such towels during the period of the promotion, stating:

> They [petitioners] fail to recognize that just as their purchases were made for later sale, so, inevitably, were Roberts Brothers'. Indeed, since Roberts Brothers, as a department store, was continuously stocking and selling towels, its purchases in April, June, and November clearly were for maintenance of its stock level (Resp. Br., p. 53).

No support is cited for this bald assertion and there is none. Respondent would have the Court find, without evidentiary support, (1) that Roberts Brothers was in fact "continuously stocking and selling towels" and (2) that its April, June and November purchases from Cannon Mills were "clearly" for maintenance of stock level. Even if it should be proper to assume that Roberts Brothers con-

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[16] Respondent also argues that the use of identical invoice designations by Tri-Valley and Cannon Mills establishes like grade and quality of products (Resp. Br., pp. 41, 52). Petitioners, however, as in the case of Burlington, have pointed out that other evidence destroys any prima facie value the invoice designations might have, thus rendering the Commission's inference of like grade and quality improper (Pet. Br., pp. 53-54, 56-57).

tinuously stocked and sold towels, what is there to show that such towels were products of Cannon Mills? The inference drawn is totally lacking in evidentiary support.

The arbitrariness in the Commission's so-called findings in this case is obvious. Cannon Mills' payment to Fred Meyer was 10¢ per dozen towels purchased. In the companion case against Cannon Mills this 10¢ allowance was alleged to have been an illegal price discrimination while here it is alleged to have been part price discrimination and part promotional allowance discrimination. In the *Cannon Mills* case, it was established before the examiner that the full 10¢ was cost justified and the Commission, without reaching the issue of cost justification, ruled that the evidence did not even support a threshold finding of the required probable competitive injury. Respondent now abandons the contention (and its own finding) that Cannon Mills violated Section 2(a) in granting the allowance to petitioners (Resp. Br., pp. 74-75), but maintains that a portion of the allowance violated Section 2(d). How incongruous it is, when considering that 2(d) is a *per se* section because it is assumed that the practices prohibited thereby inevitably result in competitive injury, to indulge in this assumption in the face of a specific finding by the Commission that the same allowance, when challenged under another section, did not result in competitive injury or even create a probability of such.

Petitioners' argument regarding Philip Morris (Pet. Br., pp. 61-66) is that there is no evidence to support a finding of actual disproportionality since, as the Commission itself concedes, "the record is silent as to the comparative volume of purchases by [petitioners] on the one hand and those two non-favored buyers on the other hand . . ." and that "it is impossible to determine whether or not Philip Morris fairly apportioned its promotional money among them" (Pet. Br., p. 63). Ignoring this failure of proof, respondent merely argues that petitioners received "special allowances," that the two allegedly disfavored customers received only "regular" or standard allowances, and that a Section 2(d) violation can therefore be found since there is no evidence that the allowances received by Fred Meyer were affirmatively offered to such customers, (Resp. Br., pp. 53-57). Assuming *arguendo*[17] that this is correct, it cannot support the finding made. Proportionalization, the Commission has declared, can be accomplished on any basis that fairly proportions benefits among competing customers. FTC Guides for Advertising Allowances and Other Merchandising Payments and Services, 1 CCH Trade Reg. Rep. ¶3980, p. 6076. And in *Vanity Fair Paper Mills, Inc.* v. *FTC,* 311 F. 2d 480 (2d Cir. 1962), the Court, without concerning itself with the nature of the allowances received, found disproportionality because *total* promotional payments—*"special" and "standard"*—granted during a particular year gave the favored customers a larger percentage, based on sales, than the disfavored customers (311 F. 2d at 483). Absent specific proof, therefore, that actual proportionalization was not accomplished, considering *total* promotional receipts, it cannot be concluded that Philip Morris violated Section 2(d).

B. The Commission Erred In Finding That Petitioners Induced And Received Promotional Payments With Knowledge Of Facts Rendering Such Payments Unlawful

Petitioners contend the Commission erred in holding that mere initiation of a promotional program by a buyer places it on notice of illegality and automatically requires affirmative inquiry as to the legality of the payments requested and that such holding is unprecedented and contrary to the Supreme Court's holding in *Automatic Canteen Co.* v. *FTC,* 346 U.S. 61 (1953). Respondent's answer (Resp. Br., pp. 67-71) is that "the ruling is not unprecedented but follows logically from" *Grand Union Co.* v. *FTC,* 300 F. 2d 92 (2d Cir. 1962); *American News Co.* v. *FTC,* 300 F. 2d 104 (2d Cir. 1962); and *Giant Food Inc.* v. *FTC,* 307 F. 2d

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17 Petitioners do not concede that such affirmative offers were not in fact made. The Philip Morris witness, as respondent notes, had no knowledge whether such offers were made (Resp. Br., p. 56). This same witness, however, testified that allowances of the type granted Fred Meyer were "available" to other customers (Pet. Br., pp. 89-90; R. 536, 538).

184 (D.C. Cir. 1962).[18] In none of these cases, however, was it held that a buyer possesses a duty of making affirmative inquiry merely because it has initiated a particular program. Indeed in *Grand Union* where affirmative inquiry was not even in issue, the test enunciated was whether ''in the exercise of reasonable care'' (300 F. 2d at 100) the buyer should have known of illegality. Even in the face of evidence establishing overt coercion of suppliers, the Commission itself declined to find knowledge of illegality simply on the basis of a failure to make affirmative inquiry in the *American News* case (58 F.T.C. 10 (1961)).

Nor does the *Giant Food* case hold that a buyer automatically possesses a duty of affirmative inquiry when he initiates a particular program. There the Court held that the question is whether, ''upon the record as a whole, the Commission introduced enough evidence to show that Giant, at the time it induced and received the payments from its suppliers, possessed information sufficient to put upon it the duty of making inquiry. . .'' and that want of knowledge could not be pleaded by the buyer, ''where it appears that such want of knowledge . . . was culpable'' (307 F. 2d at 186-87). The Court went on to find a Section 5 violation by Giant, not merely because it initiated the program, but because Giant had insisted that the payments received were to be over-and-above the regular programs of its suppliers and because the terms of Giant's program were ''vague and general'', thereby precluding suppliers from formulating programs for other customers (307 F. 2d at 187).

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[18] Respondent also contends (Resp. Br., p. 70), that *R. H. Macy & Co.* v. *FTC*, 326 F. 2d 445 (2d Cir. 1964), is precedent for the Commission's ruling, since the court held that once the Commission proved special payments were made to Macy, it was Macy's burden to show that similar payments were available to its competitors. This holding, respondent asserts, ''goes further than but includes the Commission's [ruling] in this case; the burden of proving availability cannot be carried without first ascertaining availability'' (Resp. Br., p. 70). *Macy*, however, was in no way concerned with the question of affirmative inquiry. Respondent attempts to equate the necessity of obtaining information for trial with the necessity of affirmative inquiry at the time the allowances were requested. This, of course, is absurd on its face.

Contrary to respondent's contention, it is clear that the Commission's holding in the instant case is diametrically opposed to the Supreme Court's *Automatic Canteen* holding. Automatic Canteen, noted the Court, occupied "a dominant position" in the market, solicited prices which it "knew were as much as 33% lower than prices quoted other purchasers", and did so "without inquiry of the seller, or assurance from the seller" of legality (346 U.S. at 62-63). The Court further pointed out that Canteen "never inquired of its suppliers whether the price differential was in excess of cost savings, never asked for a written statement or affidavit that the price differential did not exceed such savings, and never inquired whether the seller had made up 'any exact cost figures' showing cost savings" (*Id.* at 67); that the record "may be taken as presenting varying degrees of bargaining pressure exerted by a buyer on a seller to obtain prices below those quoted other purchasers"; and that in some instances Canteen's method was to "inform prospective suppliers of the prices and terms of sale which would be acceptable to [Canteen] without consideration or inquiry as to whether such supplier could justify such a price on a cost basis or whether it was being offered to other customers of the supplier" (346 U.S. at 65-66).

In both the Seventh Circuit and the Supreme Court, the Commission strenuously urged that under these facts Canteen had a duty of affirmative inquiry and, indeed, the Seventh Circuit agreed and so held (194 F. 2d at 439). In the Supreme Court, the Commission urged over and over that since Canteen initiated and affirmatively induced lower prices it was automatically guilty. Its principal argument, as stated by the Court, was that "buyers who *through their own activities* obtain a special price" can be charged "with responsibility for whatever unlawful prices result" (346 U.S. at 71-72; emphasis added).[19] However, phrased by

[19] At another point in its opinion, the Court quoted the Commission's argument "that it must now show only 'that the buyer *affirmatively* contributed to obtaining the discriminatory prices *by special solicitation, negotiation* or other action taken by him' " (*Id.* at 77; emphasis added).

the Commission, said the Court, this argument must be rejected as it would render the "knowingly" requirement meaningless (*Id.* at 71); "would comprehend any buyer who engages in bargaining over price" (*Id.* at 72); would put "the buyer at his peril whenever he engages in price bargaining" (*Id.* at 73); and would adversely affect "that sturdy bargaining between buyer and seller" and be inconsistent "with the broader antitrust policies that have been laid down by Congress" (*Id.* at 74).

In dealing specifically with the question of affirmative inquiry by the buyer, the Court noted that any representations by a seller are inherently suspect and unreliable (346 U.S. at 80, n. 24). How illogical and meaningless it is for the Commission to require a buyer to make affirmative inquiry when the response of the seller, whether favorable or unfavorable, would not be something which he, as stated by the Court, "can rely on or should be charged with" and when, because of the very nature of the situation "serious doubts" would exist "as to the weight the assurance [of legality] should be given in support of a buyer's claim" of innocence.

Over and over, the Court in *Automatic Canteen* stressed the necessity for arm's-length bargaining between buyers and sellers in the interest of "broader antitrust policies" and rejected admittedly plausible and permissible interpretations of both statutory language and legislative history "in view of the effect it might have on that sturdy bargaining between buyer and seller for which scope was presumably left" (*Id.* at 73-74). Significantly, this landmark holding was on the basis of a record showing actual dictation of prices by the buyer in a most insistent manner. Obviously, the Commission's holding here that a buyer is required to make inquiry of his suppliers and cross examine them as to the legality of any proposed price or promotional allowance suggested by the buyer is completely at war with *Automatic Canteen.*

Respondent further contends that petitioners knew of the alleged illegality of the supplier payments because of the legend which it claims appeared in "the coupon-book participation *contracts*'' (Res. Br., p. 72; emphasis added), stating:

> The Commission found (R. 119), and petitioners do not dispute here, that the coupon-book participation contracts contained the provision: ''Offer Must Be Exclusive at Fred Meyer During the 4 Week Period.'' The Commission found (R. 120) that this means that ''each supplier who participated in [petitioners] 'coupon-book' promotion agreed with [petitioners] that it would not, during that particular four-week period of time, 'participate' in a similar program sponsored by any other buyer.'' Petitioners do not dispute that finding here, but argue (Brief 83) that there is no evidence that the contractual requirement was carried out (Resp. Br., p. 72).

This is a misstatement of fact and of petitioners' argument. First, petitioners do not concede that the language meant what the Commission interpreted it to mean (Pet. Br., p. 83). Second, the language was not a contractual provision and was not contained in any contract but appeared in a form letter which was in no sense a contract or agreement (see CX 7, 17) and which most suppliers did not even receive. The letter was *not* presented to Cannon Mills or Burlington (R. 358, 430-31), or to Tri-Valley in 1958 (R. 199-200, 576). As to Tri-Valley in 1957 and Idaho Canning, the evidence is only that the letter may have been presented (R. 194, 208). Respondent's contention that the language ''shows petitioners purpose to obtain. . . discriminatory payments'' is totally unwarranted.

Respondent next passes off as ''scraps of testimony'' (Resp. Br., p. 72) the evidence which petitioners contend establishes that they did not know the allegedly disfavored customers purchased goods of like grade and quality and did not receive or have available proportional allowances. It contends, indeed, that the evidence that petitioners had no knowledge of many of these essential elements, and, indeed, could not have obtained such knowledge, the ultimate issue here, is irrelevant (Resp. Br., p. 72). It is just such refusals to consider the evidence, and the drawing of inferences contrary to such evidence, which petitioners contend requires the "findings" be set aside (see Pet. Br., pp. 82-90).

The ultimate conclusion of the Commission, on both the Section 2(f) and Section 5 Counts, is admittedly based upon an almost never ending series of inferences (see *e.g.,* Resp. Br., pp. 41, 48, 50, 52, 73, 85, 86, 88). It is inferred, in several instances, that Fred Meyer's suppliers sold goods to its competitors in the Portland area; that such sales were of goods of like grade and quality; that sales made to competitors long prior to Fred Meyer's promotion were still stocked by such competitors at the time of the promotion; that the allowances received by Fred Meyer were not proportionalized and created a probability of lessening competition; that such allowances were not cost justified; and, ultimately, that petitioners knew that the sales to inferred competitors of inferred goods of like grade and quality at price differences which created the inferred probability of lessening competition were not cost justified and were not proportionalized. Inferences cannot be so pyramided. *Allen* v. *Trust Co. of Georgia,* 149 F.2d 120 (5th Cir. 1945); *Standard Acc. Ins. Co.* v. *Nicholas,* 146 F.2d 376 (5th Cir. 1944); *Westland Oil Co.* v. *Firestone Tire & Rubber Co.,* 143 F.2d 326 (8th Cir. 1944).

VII. The Commission's Order Is Improper

Respondent's answer to petitioners' contentions concerning the scope of the order is limited to that concerning the order's specific reference to the individual petitioners and to that concerning the inclusion of wholesalers in the Section 5 order (Resp. Br., pp. 91-92). The other contentions, respondent argues, are misdirected since they consist of criticisms of specific phrases used by the hearing examiner in his proposed order (Res. Br., p. 91). While their argument remains substantively unchanged, petitioners admit error in quoting the language from the examiner's order rather than the Commission's final order and restate that portion of their argument which does erroneously refer to the examiner's proposed order.

Accordingly, in the portion of petitioners' argument relating to the Commission's 2(f) order, subparagraph (a) appearing on page 99 of petitioners' brief is deleted. In the portion of the argument relating to the Section 5 order, the second and third full paragraphs appearing under the heading "B. The Section 5 Order," at pages 100-101 of petitioners' brief, are deleted and inserted in lieu thereof is the following paragraph:

> In *Grand Union*, the Court ruled that the Commission's discretion ". . . does not permit an injunction of all violations of the statute just because a single violation has been found." In the present case, instead of being related to the violation found, the order extends to any "service or facilities" furnished by petitioners. Furthermore, while the practice in the present case is narrowly confined to a promotional program involving the "offering for sale" of specific products manufactured by particular suppliers, the order extends to "processing," and "handling," as well as to "offering for sale" of products. The order also extends to *all* products involved in petitioners' promotional activities, *i.e.*, thousands of products, and is not limited to the specific products involved in the Commission's findings of the alleged violation as was the order in the *Quaker Oats* case (see *supra*, p. 98).

With these changes, which do not modify substantively their contentions, petitioners' argument remains as stated in their brief.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in petitioners' main brief, it is submitted that the Opinion and Order of the Commission should be set aside.

Respectfully submitted,

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Dated: April 14, 1965

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Harold F. Baker,
Attorney for Petitioners

APPENDIX

APPENDIX

Statement by Senator Reed in response to a question by Senator Walsh on the floor of the Senate, 51 Cong. Rec. 15828 (Sept. 28, 1914):

> The Senator says that the section was striken out of the bill by the Senate committee because it was thought that the Trade Commission bill covered the practices. That is true; it was so thought by some of the members; but was the provision reported by the conferees in that shape?
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> The Senator asks me if I do not think that the conferees were controlled by the same motive as the Senate committee when they went into conference. I answer no, because if they had been they would have allowed the section to stay out of the bill and justified their action on the ground that the matter had been taken care of by section 5 of the Trade Commission bill. On the contrary they said it was not taken care of by Section 5 of the Trade Commission bill when they insisted that it should be again inserted in this bill. It follows they took no such position as was taken by the Senate Committee. * * *

Senator Reed in a discussion with Senator Overman on the floor of the Senate, 51 Cong. Rec. 16154 (October 5, 1914):

> Mr. President, I have heard that argument in various forms. It embraces this idea—that when we passed the Trade Commission bill we did not intend to pass any other legislation. If it had been asserted here that the Trade Commission bill was to be the end of trust legislation at this session of Congress, it would have not passed, and the Senator knows it. On the contrary, it was during the debate on the Trade Commission bill frequently asserted that the Trade Commission bill was to be the mere handmaid of the trust statutes; that it was not to affect or destroy them; that

it was not to hold back other trust legislation. It was iteratively said in reply to those who claimed that the Trade Commission bill was not sufficiently specific or drastic: ''Be patient; wait. The Clayton bill is coming on and the Clayton bill does have penalties. Wait for it and your complaint will be met.'' Now, when it does come on, you turn to us and say: ''Having adopted the Trade Commission bill we now propose to murder the Clayton bill.''

. . . If the Trade Commission bill was intended to be the end of trust legislation, why did we not stop with it? The friends of that bill have asserted that the phrase ''unfair competition'' covers every practice injurious to business which is conceivable by the brain of man. If that is true, and if we are to proceed through the Trade Commission, then we should never touch that language. We should not pass the trust provisions of this bill. We should admit we have already completely covered that field by providing a commission enpowered to suppress all evil practices.

But the Senate did not take that view. The Senate committee undertook to say so. The Senate disagreed with the Senate committee as to one section—that relating to tying contracts—and restored it. *Then the conferees put back in the bill the sections of the Clayton bill, thus admitting that the Trade Commission did not cover those practices; for if it did cover them, it was utterly foolish again to inveigh against them. Having thus admitted the necessity of specifying those particular practices,* they then proceeded to remove the criminal penalties.

You cannot hold with the hare and run with the hounds. Driven into a corner you say ''In the first place, we did not need any law at all. We had already covered the subject by legislation.'' Then when asked why you legislated, you say, ''Well, it won't do any harm to legislate if you do not say anything when you legislate.'' That is exactly your position. You cannot sustain this action on any logical ground. *If it be true that these practices were covered by the Trade Commission bill, then that is the end of it.. We ought to stop right there. If you say, on the other hand, that*

> *they were not covered by the Trade Commission bill, then, when we enact law here, let us have a law that does something, and not a law apologized for on the ground that it is unnecessary.* [Emphasis added.]

The Commission's recommended amendment of Section 2 of the Clayton Act in *Final Report on the Chain-Store Investigation,* S. Doc. No. 4, 74th Cong., 1st Sess. (1934), at 96-97, and the Mapes Bill, H. R. 4995, 74th Cong., 1st Sess. (January 29, 1935):

> It shall be unlawful for any person engaged in commerce, in any transaction in or affecting such commerce, either directly or indirectly to discriminate unfairly or unjustly in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States.

Statements of Representative Mapes on the floor of the House, 80 Cong. Rec. 8103-8104 (May 27, 1936):

> Early in this Congress, January 30, 1935, to be exact, I introduced the bill as proposed by the Federal Trade Commission having somewhat the same object in view as the Patman bill, now about to be considered. The original Patman bill was introduced on June 11, 1935.
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> The proposal of the Federal Trade Commission was not as rigid as the Patman bill . . . In substance, it provided that there should be no unfair or unjust discrimination in prices in the selling of commodities to different buyers, and left it pretty largely with the Federal Trade Commission to determine whether the price was unfair or unjust.
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> Incidentally, it might be of interest to the House to know that this morning the distinguished Chairman of the Federal Trade Commission, Judge Davis, a very

highly respected former Member of this House, appeared before the Committee on Interstate and Foreign Commerce on a bill now being considered by that committee. He told the committee that there had been no amendment to the Federal Trade Commission Act since the passage of the original act creating the Commission in 1914. The Commission is now asking for some amendments to the original act, but for a period of over 21 years no amendment has ever been made to it.

* * *

In further answer to the gentleman from New York, I might say that I have some apprehension that the Patman bill in its present form goes too far and may be too rigid. Personally, I prefer the bill recommended by the Federal Trade Commission, which says that there shall be no unjust or unfair discrimination in price, and leaves the matter of determining the injustice or unfairness to the Federal Trade Commission.

I know that every Member of the House of Representatives has respect for the personnel of the Federal Trade Commission and would be willing to have the law administered by that Commission.

Hearings Before the House Committee on the Judiciary, 74th Cong., 1st Sess., ser. 10, pt. 1, at 254-255 (1935):

6. Would it not be preferable to enact the Mapes bill, H.R. 4995, leaving it to the Federal Trade Commission to determine what discriminations are unjust?

Socrates routed the Sophists of Athens with his question, "What is justice?" and finally himself produced no better answer than that "Justice is justice." The Supreme Court declared invalid for indefiniteness that portion of the wartime Lever Act forbidding "any unjust or any unreasonable rate or charge in the handling or dealing in or with any necessaries" or agreements "to exact excessive prices for any necessaries", *U.S.* v. *Cohen Grocery Co.* (1921) (255 U.S. 81; 65 L. Ed. 516); also a Colorado antitrust act which, after prohibiting combinations in restraint of trade, etc., exempted such as were necessary to enable the realization of a reasonable profit (*Cline* v. *Frink Dairy Co.* (1927), 274 U.S. 445; 71 L. Ed. 1146).

Unlike "reasonable rates" in public utility regulation, which are related to reasonable costs (which in turn are related to the available market of services and materials concerned) plus a "reasonable return" (which in turn is related to the current market return upon investments of similar risks)—the mere phrases "reasonable" or "just" or "unjust" furnish in the present case no anchoring measure or yardstick either in fact or in principle. If, in the practical administration of such a statute, the Federal Trade Commission were to cast about for such a principle of measure, it would, it is submitted, be compelled to settle upon the principle of measurement by differences in cost as between the customers involved in the discrimination. So long as that is the principle by which the enforcement of the bill must in any case ultimately be guided, it should be incorporated in the bill itself, and not left to adoption by the administrative body charged with its enforcement. For it must be remembered that the validity of a statute for definiteness depends upon the rule therein provided, not upon the rule which some administrative body may choose to employ thereunder.

It must also be remembered that the enforcement of this statute is not limited to the Federal Trade Commission, but that the Clayton Act also confers upon injured parties the right to proceed immediately to a court of law and sue for redress in civil damages. To those whom the bill seeks to protect, this is by far the most important remedy. The Federal Trade Commission's procedure results, at best, in nothing but a cease-and-desist order, which must still be taken to the courts for enforcement, and which in any case affords no reparations nor imposes any penalty for past violations.

Any principle of action by which the administration of this law is to be governed, if it is to be one upon which business can rely for its guidance, must be incorporated in the law itself. It cannot be added by administrative action thereunder. For the Commission's decisions do not make or settle or build up law, except as they furnish the courts occasion to do so in judicial review. The Commission is not a court. It exercises merely administrative and not judicial power. *Federal Trade Commission* v. *Eastman Kodak Co.* (1927), 274 U.S. 619; 71 L. ed. 1238). While under the present Federal Trade Commission Act it may proceed against "unfair methods of competition in commerce". What legally constitutes such methods is a question that the courts alone, and not the Commission, can ultimately determine. (*Federal Trade Commission* v. *Gratz* (1920), 253 U.S. 421; 64 L. ed. 993; *Federal Trade Commission* v. *Sinclair Refining Co.* (1923), 261 U.S. 463; 67 L. ed. 746.) So also, whether leases, sales, etc., are such as to lessen competition or promote monopoly contrary to section 3 of the Clayton Act, is a question finally for the courts and not for the Commission. (*Federal Trade Commission* v. *Curtis Publishing Co.* (1923), 260 U.S. 568; 67 L. ed. 408.) In each case the Commission can only determine the facts upon the evidence before it and issue its order; but whether those facts legally warrant that order is a judicial question remaining for the courts.

However broad the limits of authority with which this Congress may endow the Commission, it cannot, therefore, build up by its decisions any principles of law or action within those limits. The question before the courts each time is, *Did the Commission act within its power under the law?* If one commission observes limits narrower than those conferred by the statute, a later commission is equally free to broaden them, and a still later commission just as free to narrow them again. To endow the Commission, therefore, with an indefinite latitude of authority, with the hope that it will work out more definite principles of law by its own decisions, is in vain. It can never make the law any more definite than it will be as the Congress now enacts it.

Aside from the above difficulties, the Commission's record of past performances is not such as to inspire confidence in its aptitude for the application of sound principles of law. Out of 39 occasions in which the Commission's motion has come before the Supreme Court of the United States for review since the Commission's creation, it has been sustained in 16 cases and reversed or overruled in 23 . . .

Final Report on the Chain-Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. (1934), at 65:

> It may very well be that a violation of section 2 of the Clayton Act is *ipso facto* an unfair method of competition and therefore a violation of section 5 of the Federal Trade Commission Act. It does not follow, however, that a discrimination in price which falls short of violating the first may be attacked under the second. If the discrimination is actually within the provisos and exceptions of section 2, those same defenses would doubtless be interposed to a proceeding under section 5, with perhaps controlling effect. The wiser course seems to be to treat the price discriminations in favor of chain stores only as a possible violation of section 2, and not as a possibly unfair method of competition. The point cannot be overlooked that if price discrimination was included under the general prohibition of unfair methods of competition when the Federal Trade Commission Act was passed, the latter expression of legislative will in the Clayton Act dealt specifically and in detail with the subject and would therefore seem to take precedence over the more general statutory prohibition.

Statement by Senator Robinson on the floor of the Senate, 80 Cong. Rec. 6335 (April 29, 1936):

> The object of the bill is to prevent large buyers from taking unfair advantage of independents by securing terms that are out of proportion to the differences in cost, thus enabling them to destroy their competitors and to monopolize the market.

Remarks of Congressman Wright Patman, 80 Cong. Rec. 5726 (April 20, 1936):

> The inequities resulting from the present discriminatory practices in merchandising do much more than merely create competitive conditions unfair to the independent merchant. The unequal concessions exacted from manufacturers and processors, through which the favored few benefit, necessarily press backward on costs and tend to keep down or even reduce the wages of workers in those industries.

Remarks of Senator Logan quoted by Senator Alben W. Barkley, 80 Cong. Rec. 6257 (April 28, 1936):

> The evils at which the Robinson-Patman Bill is aimed are the outgrowth of two particular developments in trade and industry during the last 20 years. These are the increase in machine production and the rise of the mass distributor with his large and concentrated buying power . . .

Final Report on the Chain-Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. (1934), at 49:

> The "threats" and "coercion" used consisted of statements or intimations that unless the manufacturer would grant the chain special concessions in price, the chain would either buy the goods elsewhere, proceed to manufacture its own, or conduct its stores so as to discourage therein the sale of the recalcitrant manufacturer's goods. If it be admitted that the chain has a legal right to adopt any or all of these policies, it seems to follow that it has a right to announce its intention of doing so unless certain conditions are met. Unless the law be so made or applied as to prevent vertical integration, a chain store may engage in manufacturing. As to buying elsewhere if concessions are not given, it has not been even proposed to deprive the chains of that right. And for a chain in its own stores to encourage or discourage the sale of such goods

as it may choose in its own discretion seems beyond legal attack under any existing law. If an attempt should be made to outlaw the use of such ''threats'' and ''coercion'' without also removing the existing legal right to do the things threatened, it would be abortive and ineffective. For it is the manufacturer's recognition that the chain, with its tremendous purchasing and distributing power, may do those things and not the ''threat'' of the chain to do them that is the real inducement for granting the special concession.

Hearings Before the House Committee on the Judiciary, 74th Cong., 1st Sess., ser. 10, pt. 1, at 31-32 (1935) (from ''H.R. 8442, A Bill to Amend Section 2 of the Clayton Act,'' Specific Questions Answered by H. B. Teegarden):

9. Question. Why does the bill visit its prohibitions upon the manufacturer or other seller if the evil arises principally on the buying side?

Answer. Because the law must help the manufacturer to resist the unfair demands of the large buyer. Every price is made upon the balancing of the gains against the losses which it entails. If in weighing such demands the manufacturer must add on to the loss side his liability for violation of this law, he is so much the less likely to grant what is unfair and what he could not afford to grant all of his customers alike.

10. Question. Will not the bill place an undue burden upon the manufacturer?

Answer. No; because the manufacturer grants these demands only under fear of losing the business to some other competitor who will grant them if he does not. The more able he is made to treat all customers alike, the better and more efficiently he can organize and conduct his business, and the more easily can he do business at a profit, and at the same time grant his customers, and through them the public whom he serves, a share in his economies through reductions in prices.

H.R. Rep. No. 2287, 74th Cong., 2d Sess., at 15-16 (1936):

> Still another favored medium for the granting of oppressive discriminations is found in *the practice of large buyer customers to demand,* and of their sellers to grant, special allowances in purported payment of advertising and other sales-promotional services, which the customer agrees to render with reference to the seller's products, or sometimes with reference to his business generally. . . .
>
> Sections (d) and (e) of the bill address this evil by prohibiting the granting of such allowances, either in the form of services or facilities themselves furnished by the seller to the buyer, or in the form of payment for such services or facilities when undertaken by the buyer, except when accorded or made available to all competing customers on proportionally equal terms. [Emphasis added.]

Remarks of Senator Logan, quoted by Senator Alben W. Barkley, 80 Cong. Rec. 6257 (April 28, 1936):

> The third favorite method of discriminatory abuse lies in the grant of special allowances for so-called advertising or promotional sales services to be rendered by the buyer in the resale of goods which he has purchased from the manufacturer. The buyer, of course, makes his own profit on the resale of those goods. He buys them only for that purpose; and if he doesn't sell them, they become a dead loss on his hands. Yet mass buyers have spun the fairy story that this is a special service to the manufacturer, and that he must pay them extra for doing only what they must do in any case for their own advantage and profit . . .

Representative Greenwood on the floor of the House, 80 Cong. Rec. 8110 (May 27, 1936):

> . . . service allowances and advertising fees used as a subterfuge to give an unjust discount to someone who uses coercion . . .

Statement by Representative McLaughlin on the floor of the House, 80 Cong. Rec. 8127 (May 27, 1936):

> There are three types of discounts used as subterfuges by manufacturers to large purchasers in order to afford to those purchasers a reduction in price as contrasted with the price which the small purchaser is allowed. Those three discounts are advertising discounts, or pseudo advertising discounts, if you will; brokerage discounts or pseudo brokerage discounts, if you will, and quantity discounts . . .

Statement by Representative Michener on the floor of the House, 80 Cong. Rec. 8236 (May 28, 1936):

> . . . that is one of the troubles and discriminations here—that one of these manufacturers will sell to one store, say, a million units, provided they do so much advertising, and then, in turn, will exchange checks and pay the purchaser for doing the advertising, and the advertising consists in hanging up a two by four sign.

Remarks by Representative Utterback, 80 Cong. Rec. 9419 (June 15, 1936):

> This paragraph makes the buyer liable for knowingly inducing or receiving any discrimination in price which is unlawful under the first paragraph of the amendment. That applies both to direct and indirect discrimination; and where, for example, there is discrimination in terms of sale, or in allowances connected or related to the contract of sale, of such a character as to constitute or effect and indirect discrimination in price, the liability for knowingly inducing or receiving such discrimination or allowance is clearly provided for under the later paragraph above referred to.

Hearings Before the House Committee on the Judiciary, 74th Cong., 1st Sess., ser. 10, pt. 1, at 31 (1935) (from

''H.R. 8442, A Bill to Amend Section 2 of the Clayton Act,'' Specific Questions Answered by H. B. Teegarden).

> 6. Question. Why does the bill pick out quantity prices, brokerage and advertising allowances for suppression?
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> Answer. Because these are the three favorite disguises under which large buyers wring their exactions.

Final Report on the Chain-Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. (1934), at 59-60:

> The term ''preferential treatment'' as used here means that treatment granted to chain stores but not given to other retail dealers, which results in a lower net cost to chain-store customers than to other retailers. These preferential treatments usually take the form of special discounts and allowances, sometimes given in consideration of promotional sales work or special service rendered by the chain-store receiving the concession. . . . Where preferences are granted in the form of promotional allowances without the rendition of services in return, they are, in effect, price concessions having no direct relation to quality of goods, quantity purchased, or cost of selling.

Statement by Senator Culberson on the floor of the Senate, 51 Con. Rec. 13849 (Aug. 17, 1914):

> Mr. Culberson. Mr. President, when the Committee on the Judiciary made their report on this bill, they proposed a number of amendments to section 2. Since then the Federal trade commission bill has passed the Senate and is now in conference. Under that bill all questions affecting unfair competition are to be submitted to that tribunal. I am now authorized by the committee to abandon the amendments to section 2, and to move in lieu thereof that the entire section 2 be stricken out, for the reason that the general subject embraced in that section can be dealt with by the

Federal trade commission, as provided for in the trade commission bill.

The Presiding Officer. The question is on the motion of the Senator from Texas to strike out section 2.

The motion was agreed to.

Statement of Representative Floyd on the floor of the House, 51 Cong. Rec. 16317-16318 (Oct. 8, 1914):

> . . . I desire to take up now briefly that part of the report covering sections 2, 3, and 7. The first relates to discriminatory contracts, the second relates to tying or exclusive contracts, and the third to holding companies. It will be observed that these sections deal with contractual relations in commercial dealings . . . Why the necessity of restoring these sections without penalties? In justice to the Senate of the United States let it be said that after section 5 of the Trade Commission bill had passed that body and had been approved by the House, condemning as unlawful all unfair methods of competition, the theory of the Senators was that these unfair methods would be included and cared for under the provisions of the Trade Commission bill. But that was not the view of your managers on the part of the House. Your conferees believed that in dealing with these contractual relations, the Supreme Court having held that Congress has the power to declare null and void any contract that substantially interfered with interstate commerce, but that the courts have no such power in the absence of an act of Congress condemning them, such contracts would be upheld in the future, not only by the commission but by the courts, until the legislative power of this Government declared them to be unlawful. We insisted that those three provisions be placed back in the bill, and finally they were placed back in the bill without the penalties. . .
